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Supreme Court of the United States

October Term, 1926.

No. 988.

GEO. O. RICHARDSON MACHINERY COMPANY, A CORPORATION, Petitioner,

vs.

MRS. ANNIE SCOTT, ADMINISTRATRIX OF THE ESTATE OF JOHN A. SCOTT, DECEASED, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

BRIEF OF RESPONDENT.

(NOTE: Respondent asks that her preliminary brief on file herein, in opposition to the Petition for Writ of Certiorari, may be taken and considered as part of this brief, as avoiding unnecessary repetition in the presentation of the record facts.)

PROPOSITIONS.

I.

No federal question arises upon the record in this cause, nor is presented for consideration here.

II.

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Court, is whether or not the petitioner's application to vacate the original judgment of October 23rd, 1920 (challenged by demurrer), states facts sufficient, which, if true, authorizes the vacation of said judgment, as for "unavoidable casualty, or misforture", within the purview of the seventh (7th) subdivision of Oklahoma Code, Section 810. Such question is one solely of state judicature, and was correctly decided under Oklahoma state laws.

STATEMENT.

By its special appearance in the trial court, entered on July 14th, 1921 (pp. 16-18), the petitioner properly raised a federal question, viz.:

As to whether or not it was afforded that "due process of law" guaranteed to it by the Fourteenth Amendment of the Federal Constitution, by Sections 5436 and 5442, Compiled Oklahoma Statutes 1921, providing for the issuance and service of summons, on which the original judgment was based.

For the determination of such Federal question, petitioner secured the removal of said cause into the United States District Court for the Western District of Oklahoma, where the mixed question of law and fact was fully tried out and decided: (a) that the petitioner was transacting such intra-state business in Oklahoma as to render the provisions of the said statute applicable to it, and (b) that the provisions of said statutes relating to service were constitutional and valid, as affording due process of law. No appeal from this was taken, and the cause re-

manded to the State trial court to be regularly proceeded with.

The State trial court again took up and retried *de novo* the questions raised by the special appearance, arriving at the same decision as had the Federal court, and reaffirming its own findings of the jurisdictional facts embodied in its original judgment. This phase of the matter was not appealed from, but the petitioner elected to abide the decisions on such Federal question raised by its said special appearance.

Thereupon, petitioner voluntarily submitted itself to the jurisdiction of the State trial court, sought and secured its leave to file the special statutory remedy, involved here, and filing its petition to vacate the original judgment, under the seventh subdivision of Code, Section 810, on the ground that it was prevented from defending by reason of "unavoidable casualty, or misfortune", in that the Secretary of State, on whom process of summons was served, failed to notify the petitioner thereof. An answer and cross petition was attached to the said petition to vacate, as part thereof, the answer setting up defensive matter to the judgment, and the cross petition setting up a new cross cause of action against the plaintiff, Scott, and affirmatively praying for a personal money judgment against him in the sum of $29.10.

An examination of the record undisputably shows that nothing other or further was before the court, than the sufficiency of the said petition to vacate the said original judgment, attempting to set up, but which it did defectively, a set of facts that do not as a matter of law constitute a ground of unavoidable casualty, or misfortune, under said Code, Section 810.

This is conclusively shown: (a) by the application itself (pp. 29-41); (b) by the remarks of Mr. Pinson, of counsel for the petitioner (p. 197), in asking and securing the leave of court to file the same, as follows: "The defendant * * * desires to file a petition to vacate judgment under the provisions of our statute under a petition to vacate judgment"; (c) by the statement as to the matter involved, contained in the petition of error in the Oklahoma Supreme Court (p. 1): "To vacate and set aside the said judgment (of October 23, 1920), in a proceeding as authorized by the laws of the State of Oklahoma"; (d) by the two (2) assignments of error specified in the said petition in error (p. 2) as follows: "(1) The court erred in sustaining the demurrer to the petition to vacate judgment filed by the plaintiff in error in the District Court of Oklahoma County, on June 1, 1922. (2) The court erred in dismissing the petition of the plaintiff in error to vacate judgment after plaintiff in error refused to plead further"; and (e) by the prayer of the petition in error (p. 2) as follows:

"Wherefore, the plaintiff in error prays that said judgment so rendered, dismissing the petition to vacate judgment, be reversed, set aside and held for naught, and that the plaintiff in error have judgment of this court directing the trial court to sustain the petition to vacate judgment, and to vacate the judgment rendered on October 23, 1920, in favor of the defendant in error and against the plaintiff in error herein."

BRIEF AND ARGUMENT.

Under the record is hereinbefore pointed out, we submit that no Federal question can be involved; the general entry of appearance by petitioner for all purposes, invoking the powers of the court for affirmative relief, renders moot all questions as to the validity of process of summons, and cured all defects, had any there been. It is wholly immaterial at this stage of proceedings, whether or not Code Section 5442 was constitutional, as affording due process of law. To have availed itself further of the questions raised by its special appearance, the petitioner was bound to have treated the original judgment as void, and kept itself in position to restrain its collection. It recognized finally the judgment as valid, and sought to vacate it on grounds provided by State laws; this Court is without power to afford it relief. The Oklahoma State Supreme Court is final on the one question submitted to it, arising as it does only under state laws. While the first paragraph

of syllabus (p. 223) holds valid the said Code Section 5442, the principle of law therein laid down is in no way involved in the decision rendered, but is merely *obiter*. Such section has no application to the ultimate facts, except as to the third paragraph of the syllabus, as touching upon the only question before the Court, viz.: That of "unavoidable casualty, or misfortune".

On February 21, 1927, this Court, in the case of *American Railway Express Company* v. *F. S. Royster Guano Company*, held a process statute of Virginia, very similar to Oklahoma Code, Section 5442, as valid and constitutional, and refused to vacate a judgment based on the service of summons as provided therein. In that case, the petitioner had not waived the question by general entry of appearance, as was done by the petitioner here.

We ask that the petition herein be denied, and the Supreme Court of Oklahoma affirmed.

Respectfully submitted,

JEAN H. EVERETT,
CHARLES L. MOORE,
Attorneys for Respondent.